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The Honorable Frederick P. Corbit
Chapter: 7

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

GIGA WATT, INC., a Washington
corporation,

Debtor.

MARK D. WALDRON, as Chapter 7
Trustee,

Plaintiff,

vs.

PERKINS COIE, LLP, a Washington
limited liability partnership; LOWELL
NESS, individual and California resident;
GIGA WATT PTE., LTD. a Singapore
corporation; and ANDREY KUZENNY, a
citizen of the Russian Federation;

Defendants

and

THE GIGA WATT PROJECT, a
partnership,

Nominal defendant.

No. 18-03197-FPC11

The Honorable Frederick P. Corbit

CHAPTER 7

Adv. Case No. 20-80031

**PERKINS' AND NESS'
OPPOSITION TO TRUSTEE'S
MOTION TO STRIKE
AFFIDAVIT OF RALPH E.
CROMWELL, JR. REGARDING
TRUSTEE'S MOTION TO
AMEND COMPLAINT**

PERKINS' AND NESS' OPPOSITION TO MOTION
TO STRIKE CROMWELL DECLARATION RE
MOTION TO AMEND COMPLAINT - 1

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1 **I. RELIEF REQUESTED**

2 Perkins Coie LLP and Lowell Ness (collectively “Perkins”) oppose the Trustee’s
3 Motion to Strike the Affidavit of Ralph Cromwell (Dkt. 124) and respectfully submit
4 that it should be denied. The Motion fails on at least the following grounds: (a) the
5 Motion is based on an inapplicable FRCP 56 standard, (b) the Cromwell Affidavit states
6 admissible facts even under a FRCP 56 standard, and (c) the Affidavit contains no
7 improper legal conclusions.
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10 **II. ARGUMENT**

11 **A. The Trustee Relies on an Inapplicable Summary Judgment Evidentiary**
12 **Standard.**
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14 The Trustee relies on three cases. *See* Mot. to Strike at 2 (citing *Melendez v.*
15 *Morrow Cnty. Sch. Dist.*, Civ. No. 07-875-AC, 2009 WL 4015426, at *9 (D. Or. Nov.
16 19, 2009), *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D.
17 Cal. 2006), and *Smith v. Cnty. Of Humboldt*, 240 F. Supp. 2d 1109, 1115-16 (N.D.
18 Cal. 2003)). Each of those cases discusses the evidentiary standard applicable to
19 oppositions to motions for summary judgment. *See Melendez*, 2009 WL 4015426, at
20 *7-8 (applying FRCP 56 standard that admissible evidence be submitted in opposition
21 to summary judgment); *Burch*, 433 F. Supp. 2d at 1119-20 (same); *Smith*, 240 F.
22 Supp. 2d at 1113-14 (same). However, the evidentiary standard applicable under
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1 FRCP 56 to oppositions to dispositive motions does not apply to motions to amend.
2 Rather, in general, motions to amend are left to the discretion of the trial court under
3 FRCP 15; FRCP 56 has no application. Accordingly, the standard on which the
4 Trustee relies in seeking to strike the Cromwell Affidavit is not applicable here. For
5 this reason alone, the Motion to Strike should be denied.
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8 Similarly, because a FRCP 56 evidentiary standard does not apply here,
9 Perkins' Opposition to the Trustee's Motion to Amend is not required to be supported
10 by facts that would be admissible at trial. Likewise, because a FRCP 56 evidentiary
11 standard does not apply here, this Court can and should consider the facts stated in the
12 Cromwell Affidavit regardless of whether it sets forth admissible facts (it does).
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14 Moreover, Perkins' Opposition is primarily based on the legal and jurisdictional
15 ground that the Trustee's Complaint cannot be amended at a time and in a manner that
16 would encroach on the Ninth Circuit's appellate jurisdiction. *See* Perkins' Opp'n to
17 Trustee's Mot. to Amend Compl. at 18-22. (Dkt. 120). Mr. Cromwell's Affidavit,
18 while not directly relevant to that jurisdictional issue, nonetheless provides a
19 significant amount of background information—all factual in nature—that informs
20 and rebuts many of the incorrect assertions made by the Trustee in the Motion in
21 Amend, including the Trustee's repeated *ad hominem* attacks on Perkins. If the
22 Trustee's unproven and incorrect assertions are going to be considered in any way,
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1 which they should not be, then so should a factual affidavit rebutting those assertions.

2 Finally, because an FRCP 56 evidentiary standard does not apply, because
3 Perkins is not required to (but did) present admissible facts in opposition to the
4 Motion to Amend, and because the fatal problem with the Motion to Amend is legal
5 (jurisdictional) and not factual, whether or not the Cromwell Affidavit is considered
6 does not change that the Motion to Amend is improper and cannot be granted at this
7 time.
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10 **B. The Cromwell Affidavit Contains Admissible Facts.**
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12 In any event, even under an FRCP 56 evidentiary standard—which is
13 inapplicable here—there still would be no grounds to strike the Cromwell Affidavit
14 because it contains admissible facts that inform the context of the Trustee’s Motion to
15 Amend. For example, the Cromwell Affidavit lays out in substantial factual detail,
16 with citation to evidentiary support, facts relating to the following topics: (1) Perkins
17 Coie never entered into a retention letter with the debtor; (2) Perkins Coie does not
18 have any records of having undertaken a conflict check in anticipation of representing
19 the debtor; (3) all of the information that the Trustee currently relies on to argue that
20 an attorney-client relationship existed between Perkins and the debtor is contained in
21 files identifying either Cryptonomos Pte., Ltd. (“Cryptonomos”) or Giga Watt Pte.,
22 Ltd. (“GW Singapore”) as the client; (4) the debtor never paid any invoices for legal
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1 services provided by Perkins to it; (5) all of the work that the Trustee now claims was
2 done for the debtor was billed to Cryptonomos or GW Singapore and paid for by those
3 entities, not the debtor; (6) the supposed “newly discovered evidence” on which the
4 Trustee relies was known to the debtor before this bankruptcy was filed, and the
5 existence and location of the documents at issue were known to the Trustee since at
6 least June of 2019, more than three years ago; (6) the supposed “newly discovered”
7 documents show that the debtor received virtually all of the money from the token sale
8 that the Trustee now claims as damages; (7) the supposed “newly discovered”
9 documents show that the disbursements from escrow were orchestrated by officers of
10 the debtor; (8) work relating to corporate restructuring that the Trustee now claims is
11 evidence of an attorney-client relationship between the debtor and Perkins was
12 initiated by Cryptonomos, and billed to and paid for by Cryptonomos; and (9)
13 Perkins’ assistance in responding to the request for information from the U.S.
14 government was billed to and paid for by GW Singapore, and the directive that Mr.
15 Carlson should certify the production as complete came from Cryptonomos’ in-house
16 lawyer, not Perkins.

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18 These are among the *facts* that are detailed in the Cromwell Affidavit. These
19 *facts* are supported by evidentiary records—specifically the supposed “newly
20 discovered” documents that the Trustee has known about for at least the last three
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1 years, and which should have been produced long ago in response to Perkins'
2 discovery.
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4 Even the FRCP 56 evidentiary standards improperly relied upon by the Trustee
5 in its Motion to Strike would not result in this factual information being stricken.
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7 **C. There Is No Improper Legal Argument and No Basis to Claim the Trustee**
8 **Has Been Deceived.**

9 Even the brief reference in the Cromwell Affidavit to RPC 1.6 does not
10 constitute an improper legal argument. Responding to the Trustee's various requests
11 for documents, Perkins made clear that it had (a) no retention letter with the debtor;
12 (b) could find no record of any conflict check in anticipation of representing the
13 debtor; and (c) that it had records in its files for Cryptonomos and GW Singapore but,
14 due to RPC 1.6 and attorney-client privilege issues, could not produce those files.
15 That Perkins believed (and believes) that it is constrained by its ethical duties to other
16 clients with respect to the information it can provide to the Trustee does not constitute
17 improper legal argument. Rather, these issues go to Perkins' reasonable state of mind
18 in responding to inquiries by the Trustee. That a lawyer's state of mind—i.e., a
19 factual issue—would be influenced by its view of its duties to other clients is not only
20 reasonable and understandable, but also required by the Rules of Professional
21 Conduct. This is particularly relevant in light of the repeated *ad hominem* attacks by
22 the Trustee impugning the integrity of Perkins and its counsel.
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1 These are factual issues, and the Affidavit merely recited to this Court what
2 those communications had been and the ethical issues that were, and had to be,
3 considered by Perkins in responding to the Trustee's inquiries.
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5 Moreover, the facts briefly summarized above, and which are as set forth at
6 length in the Cromwell Affidavit, demonstrate that the responses provided by Perkins
7 to the Trustee were factually accurate and made in good faith. The irony of the
8 Trustee's position is that the documents on which the Trustee now relies as creating a
9 sudden, supposed "paradigmatic shift" in this case have been in the debtor's control
10 all along, and have been known to the Trustee for at least three years. It would have
11 behooved the Trustee to review those documents before filing a multi-million dollar
12 lawsuit against Perkins based on a "partnership" that the Trustee now admits has no
13 basis in fact; likewise, the Trustee was *required* to review and produce those
14 documents in response to discovery served by Perkins more than a year ago. Had
15 either of these two actions been taken, we would not be where we are today. The
16 continued meritless attempts to shift the focus away from the failure of the Trustee to
17 review the debtor's own documents, and to falsely accuse Perkins of having lied when
18 there is no basis for that accusation, do not provide a reason to strike the Cromwell
19 Affidavit.
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III. CONCLUSION

Because the FRCP 56 evidentiary standard on which the Trustee relies does not apply, the Motion to Strike should be denied; because Perkins is not required to, but did, present admissible facts, the Motion to Strike should be denied; because the fatal problem with the Motion to Amend is legal (jurisdictional) and not factual, whether or not the Cromwell Affidavit is considered does not change that the Motion to Amend is improper and cannot be granted at this time.

For these reasons, the Motion to Strike should be denied.

DATED this 3rd day of November, 2022.

BYRNES KELLER CROMWELL LLP

MUNDING, P.S.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 3rd day of November, 2022, I electronically filed
3 the foregoing with the Clerk of the Court using the CM/ECF System, which in turn
4 automatically generated a Notice of Electronic Filing (NEF) to all parties in the case
5 who are registered users of the CM/ECF system. The NEF for the foregoing
6 specifically identifies recipients of electronic notice.

7 By /s/ Ralph E. Cromwell, Jr.

8 Ralph E. Cromwell, Jr.

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